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ABRAHAM CLARK FREEMAN.

Abraham Clark Freeman, the author of the well known treatises on "Judgment," "Executions," and "Co-Tenancy and Partition," which bear his name, and for the past six years editor of the "American Decisions," though long recognized by the legal profession as one of its ablest writers, is still a comparatively young man. He was born May 15, 1843, near Warsaw, Hancock county, Illinois, and obtained his education principally in the common schools of that county. In 1860, at the early age of seventeen, he began teaching a district school in his native county and continued in that occupation until January 1861, when he went to St. Louis, Mo., and entered Bryant & Stratton's college, from which he was graduated April 10, 1861. Returning to his home in Warsaw, he, a few days after his graduation, started with his father, O. S. Freeman, "across the plains" to California. Arriving in California in September 1861, Mr. Freeman, the elder, settled at Elk Grove, near Sacramento. Ten days afterwards young Freeman, with characteristic energy, began teaching a district school in San Joaquin county, and continued that employment for nearly a year. He had no taste, however, for the business of teaching "the young idea how to shoot." This distaste for the pursuit in which he was engaged, led him finally to abandon it. He then went to work on his father's farm where he remained for another year. In the meantime he began to study for the legal profession, and in the intervals of rest to prepare himself to enter a law office, read Hume's and Macauley's Histories of England, and Blackstone's Commentaries. In September 1863 he entered the office of Hon. M. M. Estee, author of "Estee's Pleadings," as a student of the law, and in July following was admitted to the bar by the Supreme Court of the State. He did not at once enter upon the regular practice of his profession, but served as deputy district attorney for the county under Hon. M. M. Estee and Hon. James C. Goods, until March 1870. He then entered into regular practice at Sacramento, and since that time has continued in it without intermission, sometimes in partnership with others, and sometimes alone. He is now the senior partner in the firm of Freeman, Johnson & Bates, having offices in Sacramento and San Francisco, and enjoying a very extensive practice.

Mr. Freeman was married September 6, 1867, to Miss Josephine B. Foulks, of Sacramento.

The treatise on the "Law of Judgments," which appeared in January, 1873, was Mr, Freeman's first published work. It introduced him at once to the bench and bar of the whole country as one of the ablest law-writers of the day, and took its place as the standard text-book in that branch of the law. It has already passed through three editions, each successive edition being carefully revised by the author. The work was followed in 1874 by "Freeman on Co-Tenancy and Partition," and in 1876 by "Freeman on Executions," and in 1877 by a monograph on "Void Legislative, Executive and Judicial Sales," all of which were received with distinguished favor by the legal profession. In 1879, Mr. Freeman, fortunately for the success of the enterprise, was selected by the publishers as editor of the *American Decisions* upon the death of Mr. John Proffatt, the former editor of the series. Mr. Freeman accepted the arduous post with great reluctance, but having accepted it, he performed

the labors incident to it with his accustomed ability, industry and care, and has given the series a leading position among the legal productions of our time.

Every official position which he has held has been in the direct line of his profession. Thus, in 1878, he was elected to represent Sacramento county in the California State Constitutional Convention, and again, in 1879, he was appointed by Gov. Irwin and Gov.-elect Perkins, with Hons. I. S. Belcher and Thos. P. Stoney, upon a commission to prepare and report to the State Legislature such amendments as were required to harmonize existing statutes with the new constitution of the State.

Of Mr. Freeman's merits as a law-writer it is not necessary that we should say anything. His works speak for themselves. As a practicing lawyer he is distinguished by the same qualities which have given him success as an author. In the preparation of his cases he is studious, careful, diligent, methodical. His oral arguments, like his writings, are clear, concise, vigorous, and closely reasoned.

In person Mr. Freeman is tall, erect, square-shouldered and of spare build. He is of fair complexion with brown hair and beard, light blue eyes which have the habit of looking those whom he is addressing squarely in the face, and with well cut features. His manners are affable and he is a pleasant talker when he cares to talk, though, in general, like other studious, thoughtful and busy men, he is somewhat taciturn.

CURRENT EVENTS.

THE INDICTMENT AGAINST RIEL.—The indictment consists of six counts, one of which charges that "Louis Riel, being a subject of Our Lady the Queen, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigations of the devil, as a false traitor against the said Lady Our Queen, and wholly withdrawing the allegiance, fidelity and obedience which every true and faithful subject of our said Lady the Queen ought to bear toward our said Lady the Queen, the 26th day of March, in the year aforesaid, together with divers other false traitors to the said Stewart unknown, armed and arrayed in warlike manner—that is to say, with guns, pistols, bayonets and other weapons—being then unlawfully, maliciously, and traitorously assembled and gathered together against our said Lady the Queen, most wickedly, maliciously, traitorously did levy and make war against the said Lady our Queen, at Duck Lake on the 26th of March, at Frog Lake on the 24th of April, and at Batoche on the 10th, 11th and 12th of May." Riel is acting like a thorough poltroon, and the people of French descent in Canada appear to be wasting their sympathies on a most worthless character. After having endeavored to cast the *onus* of his late rebellion upon his followers, he now sets up the defense of insanity. He who takes up arms for a cause and fails, ought to feel that it is a part of his duty to that cause to die like a man. Even such a wretch as Guiteau could do that.

THE NEW LAW PEERS.—The recent change of government in England was attended with the creation of four new law peers. Concerning this the *Law Times* (London) says: "The addition to the House of Lords of four legal members at one time, is doubtless unprecedented in English history. Sir Hardinge Giffard, the Lord Chancellor, has already taken his seat as Lord Halsbury, and will soon be followed by Mr. Gibson, henceforth to be known as Lord Ashbourne. With them will appear Sir Robert P. Collier, who has earned his distinction by fourteen years' service as a paid member of the Judicial Committee of the Privy Council, and Sir Arthur Hobhouse, who has been an unpaid member of the same distinguished body for four years only. Not one of the new law peers is at all likely to fill the place left vacant by Earl Cairns, but all of them give promise of useful service in the Supreme Appellate Court of the United Kingdom, so far as their other duties may allow them to attend its sittings. Sir Arthur Hobhouse will occupy a peculiar position in the House of Lords, owing to his never having occupied one of the offices which, under § 5 of the Appellate Jurisdiction Act, 1876, constitute the qualification of a 'Lord of Appeal.' Having practised as a leading counsel in the

Rolls Court whilst Sir John Romilly presided there, he was appointed legal member of the India Council, the post which is now filled by Mr. Ilbert. On the expiration of his term of office in India he returned to this country, and was frequently engaged in arbitrations till in March, 1881, he was appointed a member of the Judicial Committee of Her Majesty's Privy Council, in the place of Sir Joseph Napier. This post is a purely honorary one, as the Act 34 & 35 Vict. ct 91, by which four paid members of the Privy Council were appointed in 1871, only contained a power of renewal limited to two years from the time of its passing, and § 14 of the Appellate Jurisdiction Act, 1876, provided for the appointment of one paid law lord whenever two of the paid privy councillors should have died or resigned; so that Sir Arthur Hobhouse receives no remuneration beyond the pension to which he is entitled as retired legal member of the India Council. § 5 of the same act provides that 'an appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons'—viz., the Lord Chancellor, the paid law lords, and 'such peers of parliament as are for the time being holding or have held any of the offices in this act described as high judicial offices.' The offices so described by the act (§ 25) are those of Lord Chancellor of Great Britain or Ireland, paid judge of the Judicial Committee, or Judge of the Supreme Court in England, the Court of Session in Scotland, or the Superior Courts of Law and Equity in Ireland. Sir Arthur Hobhouse will, we believe, be entitled by the ancient custom of the House of Lords, which the Appellate Jurisdiction Act did not affect, to take part in judicial decisions, and to have his vote reckoned. Thus the Earl of Devon, who took part in the decision of the great case of Atwood v. Small,[1] had only been a Master in Chancery, but was called in on account of the equal division of opinion amongst the other law peers, according to the statement of Sir George Jessel in Redgrave v. Hurd.[2] But he will not form one of the quorum of three law lords, nor be qualified to sit during a dissolution of Parliament, if, for example, it should be deemed advisable to hold sittings of the House of Lords for judicial purposes at the close of the present year, during the interval between the dissolution of the existing Parliament and the re-assembling of the new one."

[1] 6 Cl. & Fin. 344.
[2] 45 L. T. Rep. N. S. 485; 22 Ch. Div. 1.

PROTECTING AN OPERA WHICH HOLDS UP THE SOVEREIGN OF ANOTHER COUNTRY TO RIDICULE.—It does not seem to have occurred to court or counsel in the recent proceeding in the United States Court at New York City, in which Messrs. Gilbert and Sullivan and D'Oyely Carte procured an injunction against Mr. Rosenfeld to restrain him from producing a burlesque opera entitled "The Mikado," in violation of their rights, that a literary composition which holds up to ridicule the sovereign of a foreign country is not, on grounds of public policy, entitled to protection at the hands of the law. There is good authority pointing in a general way to this conclusion, of which it is perhaps, not necessary to do more than to refer to the decision of Lord Eldon in which he refused to enjoin a piracy of Lord Byron's drama entitled "Cain," on the ground that he (Lord Eldon) having taken pains to read the piece, found that it contained matter contrary to the Holy Scriptures —in other words, that it was a blasphemous libel. At first blush, it would seem absurd that a court of chancery should refuse an injunction to prevent the multiplying of copies of a blasphemous libel, or other improper publication; but it is perceived that the governing principle lies deeper than the effect of the decision upon the particular work. It means to convey a notice to authors that the law will not protect any piece which an author may write which is scandalous, obscene, blasphemous, or otherwise immoral or contrary to public policy. In this play called "The Mikado," the chief character purports to be the Mikado of Japan; the other characters are his son and the lords and ladies of his court. It is obvious that the play is, in a legal sense, a libel upon the sovereign of one of the most ancient and sensitive peoples with which the United States are in amity; and it is too plain for argument that a court of the United States ought not to lend its aid to protect such a literary composition. It rather ought to be

the subject of an indictment and a criminal prosecution. This will be more apparent if we consider how it would seem if, for the mock characters in the play called "The Mikado," the Queen of England and the lords and ladies of her court were substituted. A cry of indignation would go up against such a play which could not be endured.

NOTES OF RECENT DECISIONS.

CORPORATIONS. — [CHARITABLE—TORTS] — PAYMENT OF DAMAGES OUT OF TRUST FUNDS.— In *Perry v. House of Refuge*,[3] the Court of Appeals of Maryland hold that the House of Refuge, being a corporation instituted for charitable purposes, cannot be made liable in damages for an assault committed by one of its officers on an inmate of the institution. Damages, the court hold, cannot be recovered from a fund held in trust for charitable purposes; the recourse of the injured person is against the wrong-doer. The court recognizes the fact that there are decisions on both sides of this precise question, and in this conflict of authority they adopt what seems to them the correct rule. In the opinion of the court Yellott, J., said: "It cannot be denied that the House of Refuge is an institution holding property contributed solely for benevolent purposes. If under the impulse of that humanity, which is the distinctive characteristic of the present age, associations are formed for the erection of hospitals with a view to afford relief to indigent sufferers from physical afflictions, it might with obvious propriety be suggested that an institution, originating in the co-operative action of benevolent individuals, and having for its object the amelioration of the condition of unfortunate minors who have become the victims of vicious habits and propensities, should be designated as a hospital for the cure of moral diseases. Youths, in whom the seeds of vice have already germinated, are placed there under proper restraint, so that the growth of crime may be arrested or eradicated in its incipiency. Funds are contributed by individuals impelled by philanthropic motives, and donations are obtained from the municipal and State treasuries. These are the funds of the institution, controlled by the managers, not for their own profit or benefit, but solely for the charitable purposes designated by its organic law. This then is an institution resting on an eleemosynary foundation. In McDonald v. Mass. General Hospital,[4] it is held that a corporation, deriving its funds mainly from public and private charity, and holding them in trust for the object of sustaining the hospital, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable institution; and where it has exercised due care in the selection of its agents, it is not liable in an action for injury caused by their negligence. In the case of The Feoffees of Heriot's Hospital v. Ross[5] in the House of Lords, it was decided that if charity trustees are guilty of a breach of trust, the person thereby injured has no right to be indemnified by damages out of the trust fund."

CONSTITUTIONAL LAW — DISTINCTION BETWEEN DIRECTORY AND MANDATORY PROVISIONS.—In *Ex parte Falk*,[6] the Supreme Court of Ohio take a distinction between constitutional provisions which are mandatory, and those which are directory merely. In the opinion of the court by Okey, J., it is said: "The constitution contains, in the article relating to the legislative department, various provisions as to the forms to be observed in the passage of a bill, as to the structure of a bill, the number of members required to pass it, and the effect and operation of the bill when passed. All of these provisions, legislators are morally bound to observe, and in some States it is held that the failure to observe any of them will be fatal to the validity of an act.[7] But in this State it is well settled that the failure of the general assembly to observe some of those provisions will not be attended, in the courts, with the same consequences that will follow the failure to observe other pro-

[3] 63 Md. 20 (Adv. Sheets.)

[4] 120 Mass. 432.

[5] 12 Clark & Finelly, 507.

[6] 13 Weekly Law Bulletin, 302.

[7] Cooley's Const. Lim., 5 Ed. 88-98.

visions. In other words, the courts of this State hold that some of those provisions are merely directory to the legislature, and an objection that they were not observed will be unavailing in the courts; while other provisions are held to be mandatory, and a failure to observe them will render the statute void. Thus, the provisions as to the number of times a bill shall be read; that no bill shall contain more than one subject, which shall be clearly expressed in its title; and that if a law is amended, the old section or sections shall be expressly repealed, are among those which are held to be merely directory.[8] On the other hand, the provisions that the general assembly shall, except in certain specified cases, exercise no appointing power; that the legislature shall not authorize a county to become a stockholder in, raise money for, or loan its credit to, a corporation; that money shall not be paid out of the treasury, without consent of two-thirds of the members of each house, on any claim the subject matter of which shall not have been provided for by pre-existing law; that all laws of a general nature shall have a uniform operation throughout the State; that no special act conferring corporate powers shall be passed; and some other provisions, have been held to be mandatory.[9] Hence, the distinction seems to be, that those provisions relating to the structure of a bill, or the forms to be observed in the passage of a bill, are, as a general rule, merely directory; while provisions relating to the number of members required to pass a bill, or the effect and operation of a bill when passed, are usually regarded as mandatory."

[8] Miller v. The State, 3 Ohio St., 475; Pinn v. Nicholson, 6 Ohio St., 176; Lehman v. McBride, 15 Ohio St., 573; The State v. Covington, 29 Ohio St., 102; Oshe v. The State, 37 Ohio St., 494; The State v. Cappeller, 39 Ohio St.. 207.

[9] Cass v. Dillon, 2 Ohio St., 607-617; Kelley v. The State, 6 Ohio St., 269; The State v. Kennon, 7 Ohio St., 546; Allbyer v. The State, 10 Ohio St., 588; Fordyce v. Godman, 20 Ohio St., 1; The State v. Cincinnati, 20 Ohio St., 18; Taylor v. Ross Co., 23 Ohio St., 22; The State v. Davis, 23 Ohio St., 434; *Ex parte* Van Haggan, 25 Ohio St.. 426-431; The State v. Mitchell, 31 Ohio St., 592; The State v. Williams, 34 Ohio St., 218; McGill v. The State, 34 Ohio St., 228-238; The State v. Powers, 38 Ohio St., 54.

PRIORITY OF CLAIMS FOR LABOR AND MATERIALS OVER LIEN OF RAILROAD MORTGAGE.

Scarcely anything in the domain of jurisprudence is more admirable to contemplate than the adaptability of the common law as illustrated by the vast system of railroad law which, in the memory of men now living, has sprung out of comparatively few and simple rules relating to corporations, carriers, and some other subjects, and established long before railroads were dreamed of. At the same time, it must be borne in mind that unless we would hinder its development, these sources of railroad law must not be too rigidly adhered to. An apt commentary on this truth is afforded by the subject of this paper.

By analogy to the well-known law of mortgages in general, a railroad mortgage has been held to have precedence over other and unsecured claims against the company.[1]

In 1870 in Galveston R. R. v. Cowdrey, it was agreed that the rule of martime law giving priority to the last creditor who furnished the means of preserving the vessel should be applied to railroad mortgages; but the Supreme Court said that the rule had never been introduced, except in maritime cases, which stood on a particular reason.

Decisions in State Courts in Virginia and Kentucky—in the latter State by a not unanimous court—vigorously asserted the superior equities of railroad employees and material men, arguing, that in appointing a receiver the court might impose equitable conditions; that railroads had public as well as private duties and relations, which obliged it to keep running, and this the bondholders well knew; that nothing could be more equitable than the claims of those without whom it would be impossible for the road to discharge the duty to the public which devolved upon it. Other unreported decisions there are to the same effect, if not upon the same reasoning.[2]

In spite of these cases, the general rule was so fixed in favor of the bondholder that the

[1] Galveston R. Co. v. Cowdrey, 11 Wallace, 459; Duncan v. M. & O. R. Co., 2 Woods, 545; A. M. & O. R. Co. case, 3 Hughes, 320; Ketchum v. R. Co., 3 C. L. J. 459.

[2] Duncan v. R. Co., 9 Am. Ry. Rep. 386; Douglas v. Cline, 12 Bush. (Ky.) 608. See unreported cases cited in Taylor v. P. & R. R. Co., 7 Fed. Rep. 378.

author of Jones on Railroad Securities (section 561) laid it down that "In no case has any one of the Federal Courts allowed claims for supplies or for labor in preference to existing mortgages when the mortgagees have not consented to such allowance." [3]

Just as the text-book from which we quote appeared, the Supreme Court decided the case of Fosdick v. Schall,[4] which introduced a radical charge in the law. In this case the Chicago, Danville and Vincennes R. R. gave a mortgage on its franchises and profits and on all the property it had or might thereafter acquire. Afterwards the company entered into a contract for the purchase of cars, which were to be paid for in instalments and were to remain the property of the seller until fully paid for. A receiver was appointed under foreclosure proceedings, and, the cars being needed for the road, he agreed to pay a monthly rental with interest on deferred payments, until the amount paid should equal the value of the cars, which should then become the property of the company. A sale under the mortgage was decreed, not including the cars, and the case came to the Supreme Court on a controversy about the latter. The Court, through Mr. C. J. Waite, announced the following as principles applicable to such cases:

1. When a court of chancery is called upon by railroad mortgagees to appoint a receiver, he must subject to such conditions as will ensure justice to all parties concerned. He who seeks equity must do equity.

2. In the Chief Justice's own words: "when companies become embarrassed it frequently happens that debts for labor, supplies, equipment, and improvement, are permitted to accumulate in order that bonded interest may be paid and and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he had any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that scource goes to the mortgagees."

3. The officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders, and if they give to one class of creditors that which belongs to another class, the court will set the matter right.

4. The presumption is that the fund belongs to the mortgagees.

In conformity to these principles, the court decided that the lien of the mortgage never having attached to the cars, they must be returned to the builder; that the payment by the receiver of rent for the cars was right; that the builder could not claim a prior right to the fund in court over the mortgagees, as the cars were not included in the sale, and had contributed nothing to the fund in court. The case is more noticeable for the principles laid down by the court as those which would rule future case, than for the actual decision itself.

The same month Hale v. Frost was decided.[5] When the Burlington, Cedar Rapids, and Minnesota R. R. made default in payment of the interest on its mortgage, there was already a large floating debt for equip ment, construction, repairs and wages. For two years no interest was paid on the mortgage the bondholders funding their coupons, and during this period a debt for car-springs

[3] But see Federal Court case McLean, J., cited in Taylor v. R. Co., *supra*. It does not appear whether the allowance was by consent. See on the justice of this rule 3 C. L. J. 636 and 4 id. 544.

[4] 9 Otto, 235.

[5] 9 Otto, 389.

and other machinery was incurred. After two years the bondholders had a receiver appointed.

The court in a brief opinion, and on the authority of Fosdick v. Schall, held that payment for the car springs should be made.

Quite recently another case has reiterated the same rule.[6] A mortgage was laid on the Chicago, Dubuque, and Minnesota R. R. in 1871. No interest was ever paid on it. In 1874 Bowen, assignee, furnished coal to the company. A receiver was appointed in 1875. During his period of control he paid off with sanction of court a mortgage on the depot of the company. In 1876 the foreclosure of the railroad mortgage took place, and Bowen made claim for his coal furnished. The Supreme Court said that the failure of the company to pay for the coal was due to the fact that the expense of running the road and preserving the security of the bondholders was greater than the receipts and that in those circumstances the debt was a charge on the income as well after the receiver was appointed as before. The payment of the mortgage on the depot buildings was really a diversion of the current debt fund although there could not be said to be any actual diversion because the bondholders had never had any interest. This being so, restitution could be compelled after foreclosure, from proceeds of the sale of the road. Accordingly payment of the claim for coal was ordered to be first made. Chief Justice Waite concluded; "We do not hold that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. * * * * All we now decide is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."[7]

At the risk of repetition let us summarize the principles upon which the Supreme Court proceeds in controversies between railroad bondholders and labor and supplies claimants.

1. *When bondholders ask a Court of Equity to help them to their money they must accept such fair conditions as the court imposes.*

2. A railroad must be considered a *going concern* and its officers as *trustees*. To discharge their trust they must defray operating expenses and the net income over this is for the bondholders.

3. The bondholders are *estopped* by failure promptly to foreclose when default is made. Though in Hale v. Frost the court held it unnecessary to consider this point, it certainly was recognized in Burnham v. Bowen when the court said "The company had never paid its bonded interest. From the very begining it was in default in this particular, yet the mortgage trustees suffered it to keep possession."

These rulings have been followed by State as well as Federal Courts.[8] In Williamson v. R. R. the Court of Appeals of Virginia, while adopting the reasoning of the Supreme Court of the United States goes further and takes the stand which the Kentucky Court did in 1876 when the law was the other way, that a railroad has duties to the public, a fact which all parties interested must take into their calculations. This public duty requires the road to be kept going. The Supreme Court in alluding to a railroad as a going concern may possibly have had in mind the public duty as well as the private interest of the road; but it nowhere employs this argument. Indeed, the law is sufficiently justified by the lines of reasoning we have sought to set forth; yet we cannot but think that this further argument of the public duty of railroad owners renders the law still more cogent and complete. Additional force, surely, is given to a question of private right when there can be brought to bear upon it the claim of public duty. What is the legal *status* of a railroad? It is a corporation formed for gain but from which, in return for valuable privileges granted by the State, certain public duties are exacted.

[6] Burnham v. Bowen, 111 U. S. 776.

[7] See also Huedekoper v. Loco. Works, 9 Otto, 258; Miltenberger v. R. Co., 106 U. S. 288.

[8] Williamson v. R. Co., 33 Grattan, 624; Addison v. Lewes, 75 Virginia, 701; Atkins v. Petersburg R. Co., 3 Hughes, 307; Taylor v. P. & R. Co., 7 Fed. Rep. 377; Calhoun v. R. Co., 14 Fed. Rep. 9; Dow v. R. Co. (U. S. C. C. Ark.) 17 Am. & Eng. R. R. Cases, 324.

We may turn aside for a moment here to remark that there is scarcely a case of railroad litigation, although it involve only a question of private right or injury, which cannot be more readily and fairly decided by a discriminating, temperate keeping in mind of this pervading public relation of railroads. Viewed merely in the aspect of a carrier, how much more of public duty has a modern railroad, than the stage-coaches and sailing vessels of former years!

But to resume. It is to be presumed that unless the State had expected that the railroad would benefit her citizens by keeping itself in operation, authority would never have been granted to make the serious encroachments upon private rights and convenience which a railroad must make. And if the bondholders take the road their duty to the State is not one whit less than was that of the corporation. An instance of how courts have had to bend the law to meet this necessity of keeping a railroad in operation is afforded by the Atlantic, Mississippi and Ohio R. R. case (U. S. C. C. Norfolk Va.) before cited. This case was decided just before Fosdick v. Schall wrought a change in the law, and the court refused to allow the claims of the employees, whose wages were eight months in arrears. An exception was made, in the case of those who were at that time still in the employ of the road and had not assigned their claims, upon a representation by the receiver that such a measure was necessary to the safe and successful operation of the road, and that he would not be responsible for the results if it was not done.

As to the law of maritime liens, we are not aware that any authority has in terms asserted it to be applicable to railroad securities; and yet such is virtually now the fact as far as certain classes of claimants are concerned. The last lender is first paid because he more than others has been instrumental in saving and making profitable the vessel and cargo: the railroad employee's claim for wages is preferred because unless the road had been kept going by his labor, the bondholder's security would be worth very little. If this principle be not admitted, the doctrine of estoppel applied to such cases loses much of its force.

The terms as to payment of wages and supplies, imposed as a condition of the appointment of a receiver, vary in different courts and according to the exigencies of the case. A common order is for the payment of claims for current expenses incurred within six months before the receiver's appointment. In the Reading R. R. cases it was five months.[9]

It remains to mention one or two decisions since Fosdick v. Schall seemingly in conflict with the law there laid down, and to notice the statutes adopted in several States. In the U. S. Court in North Carolina,[10] contractors and laborers who subsequent to the execution of the mortgage had done work upon the line were refused priority. The decision will be found to turn on the interpretation of a State mechanic's lien law. Perhaps also the case would not fall under the Supreme Court rule, there having been no diversion of current earnings; for as far as the report shows the road had not been operated and no earnings could have been made. In another case, a contractor for building the road paid, at the request of the company and with sanction of the bondholders, or a portion of them, an indebtedness incurred for construction. Priority over the mortgage debt was refused to his claim on the ground that he could not show any promise of indemnity by the bondholders, or anything which could estop them from asserting their priority. This case stands on different ground from others which have been before us. There was no diversion of earnings, and no failure in duty as trustees on the part of the officers of the road.

Statutes.—A Vermont Statute giving priority to claims "for service rendered or materials furnished for the purpose of keeping the road in repair or in running the same" was construed to include persons engaged in manual labor in repairing or operating the road, or who had furnished such supplies as iron, lumber, fuel, oil, ties; but the statute was held not to include officers of the road, civil engineers, attorneys, cashiers, and the like, nor claims for office rent, printing, and so forth. The court said; "The dividing line is between "services rendered in the official and executive management and authority over

[9] Taylor v. P. & R. R. Co., 7 Fed. Rep. 377. See terms of receivership discussed in Dow v. Memphis R. Co., (U. S. C. C. Ark.) 17 Am. & Eng., R. R. Cases, 324.

[10] Tommey v. Spartanburg R. Co., 7 Fed. Rep. 429.

the work of making repairs and running the road, and such laborers and employees as do this work." The reason for giving priority to certain claims for materials was that these materials had become incorporated into the railroad property, had lost their indentity, and thus increased the value of the general property to which they had become annexed.

An Alabama statute gives a lien in favor of railroad employees, except officers,[11] but does not state that this lien is to take precedence of a mortgage.

An Iowa statute gives a lien for labor or material furnished in the construction, repair, or equipment of a railroad. But this lien is not paramount to that of a mortgage executed after the commencement and before the completion of the road, nor will the lien take precedence of the mortgage when the improvements made by the claimant have become an integral part of the road.[12]

A Missouri statute confers a lien for labor or material in constructing or operating a railroad, which takes precedence of subsequent mortgages.[13]

The New Jersey law giving all persons doing labor or service of any character in the regular employ of a corporation, a prior claim for wages if the corporation becomes insolvent, includes only those persons who are employed at the time insolvency occurs.[14]

Pennsylvania and Minnesota give priority to wages of clerks, mechanics, and laborers, accrued within six months of the sale or insolvency of the concern. In the Minnesota statute, the claim must not exceed two hundred dollars; aud by both enactments the lien of a mortgage entered before the labor was performed is not disturbed.[15]

A Wisconsin statute provides that whenever a railroad goes into the hands of a receiver, wages accrued within six months of his appointment are to be paid.[16]

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[11] Revised Laws Vermont, 1880, § 3353; Poland v. R. Co., 52 Vermont, 144, Code of Alabama, 1886, § 3481.
[12] Code of Iowa, 1884, § 2130, 2132; Bear v. R. Co., 48 Iowa, 619.
[13] Walker v. R. Co., 3 C. L. J. 481; Acts of 1873, p. 58.
[14] D. L. & W. R. Co. v. Iron, Co., 33 N. J. Eq. 192.
[15] Purdons Penna Dig., p. 1464; Statutes of Minnesota 1878, p. 876.
[16] Revised Statutes Wisconsin, 1878, § 1769.

LIABILITY OF MUNICIPAL CORPORATIONS FOR DAMAGES IN GRADING HIGHWAYS.

HARMAN v. CITY OF OMAHA.*

Under the constitution of Nebraska, which provides that "the private property of no person shall be taken or damaged for public use without just compensation therefor, a city is liable to a lot-owner for such damages as it may inflict upon him by raising the grade of a street, the grade of which has not been previously established, to a level above the level of his lots; although it would not be so liable at common law.

Error from Douglas county.

G. W. Ambrose, for plaintiff; *W. J. Connell*, for defendant.

MAXWELL, J. The plaintiff alleges in her petition that she is the owner of the south 107 feet of lot 5, in block 248, in the City of Omaha, which is situated on the north side of Pierce street, and between Eighth and Ninth streets in said city; that she has "two dwelling-houses, of five rooms each, and other usual and ordinary improvements, outhouses, and the like," on said lot, all of the value of $1,200; that said houses were erected before the grade of Pierce street was established; that in the year 1878, the defendant established the grade of Pierce street, and in 1883, sought to work said street to the grade, and in doing so "filled in the earth in front of said houses and lot 5 feet, and compelled the plaintiff to erect a plank barricade in front of said premises in order to keep the earth away from said houses, at a cost of $100;" that, in order to render said houses habitable, the plaintiff will be compelled to fill said lot to the level of the street, and has sustained other damages thereby, in all to the amount of $1,600; that at no time, either before or subsequent to said grading, has she been allowed or tendered any compensation for said injury, etc. A demurrer to the petition was sustained in the court below, and the action dismissed.

The question presented is the right of a lot-owner, who has erected buildings thereon before the grade was established, to recover damages for injury sustained by him by raising the street to his injury in front of his property. At common law an injury of this kind is not actionable. And such was the rule in this State prior to the adoption of the constitution of 1875. Nebraska City v. Lampkin 6 Neb. 27. Section 21 of the bill of rights of the constitution of 1875 is as follows: "The private property of no person shall be taken or damaged for public use without just compensation therefor." The above section, without the words "or damaged," was in our former constitution. Section 13, art. 1, Const. 1866. The words "or damaged," therefore, were, without doubt, added to the section for the purpose of extending a remedy to the owner of the property in all cases where his

* S. C. 23 N. W. Repr. 503.

property has been damaged by the work done. Nor is the right to recover restricted to such injuries as were designated torts at common law. The question is not whether the work was skillfully and carefully performed or not; because, if the property of the party has been damaged by the work, however skillfully and carefully performed, he is entitled to compensation for such damages. In other words, the right to recover does not depend upon the care or skill, or the want of it, with which the work was performed, but whether the work, if carefully and skillfully done, has injuriously affected or damaged the plaintiff's property. If so, he is entitled to recover. If the work is unskillfully or carelessly performed, so that additional damages result from that cause, it is probable that a recovery can be had therefor; but that question is not before the court.

In Reardon v. City of San Francisco, 6 Pac. Rep. 325, 326, the Supreme Court of California say: "We cannot say that the convention, inserting in the constitution of this State the word 'damaged,' in the connection in which it is found, and the people in ratifying the word of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy as well where one existed before as where it did not; to superadd to the guaranty found in the former constitution of this State, and nearly all other States, a guaranty against damage where none previously existed." These remarks are applicable to this State. Our former constition required compensation to be made for property taken. If, however, no portion of the property injured was taken, and the work was carefully and skillfully done, he was without remedy. In grading a public way, a fill might be made five or fifty feet in height in front of his residence, thereby greatly depreciating it in value, and he was without means of redress. So in regard to other injuries, which need not be referred to. To afford relief in such cases the amendment above referred to was made to our present constitution. And the constitution was adopted by the people of the State with this express guaranty to every property owner in the State, that just compensation should be made for his property if taken or damaged for public use. The provision is self-operating, and requires no legislation to carry it into effect. It is the law of this State, and should be so construed as to give effect to it.

"In construing remedial statutes there are three points to be considered, viz., the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief; and it is the business of judges so to construe the act as to suppress the mischief and advance the remedy." Bl. Comm. 87. Applying these principles to the provision under consideration, it is clear that it was intended to supply a defect in the common law, and require the public,—the party benefited,—when taking or damaging property for public use, to bear the burden, by making just compensation therefor. And this rule applies whether the injury is committed by a railroad company or municipal corporation. The constitution makes no distinction as to the form of public use for which compensation is to be made; and the court has no authority to inject words into that instrument exempting municipal corporations. There are many reasons why they should not be exempted.

In this State, at least, the damage to property in cities from cuts and fills in grading streets probably affects a greater number of persons, and property of greater value, than is caused by all the railroads of the State outside of the cities and villages, for the reason that a railroad does not necessarily pass near residences, nor cause damage to farms by cuts and fills; while in a street like that upon which the plaintiff's buildings are situated, they necessarily occasion more or less damage to a large number of the lot-owners. The attorney for the city estimated the claims for such damages in that city at $150,000; but, whatever the sum is, it is evidently more just and equitable to apportion it on the property of the 50,000 or more people of the city than upon the 50 or 500, as the case may be, lot-owners who have sustained the damage. Reardon v. San Francisco, 6 Pac. Rep. 317; Rigney v. Chicago, 102 Ill. 64; Johnson v. Parkersburg, 16 W. Va. 402: Atlanta v. Green, 67 Ga. 386; Werth v. Springfield, 78 Mo. 107; McElroy v. Kansas City, 21 Fed. Rep. 257; Gottschalk v. Chicago, B. & Q. R. Co. 14 Neb. 550; S. C. 16 N. W. Rep. 475.

An elaborate opinion of the able judge before whom the case was tried, is printed in the brief of the city attorney. It contains a full review of the common-law cases, and, without a provision such as is contained in our constitution, undoubtedly states the law correctly. That provision, however, has provided a new remedy to the owners of property damaged, which he has not discussed as fully as could be desired. Upon the whole case we are of the opinion that the petition states of cause of action, and that the court erred in sustaining a demurrer to it. The question of the measure of damages does not arise in the case, and will not be discussed.

The judgment of the court below is reversed, and the cause remanded for further proceedings.

NOTE.—The word "taken," in the usual constitutional limitation upon the power of eminent domain, has been found to be inadequate to secure full justice to private citizens, owing perhaps in a measure to the narrow interpretation given to it by the courts, (ex. gr. Transportation Co. v. Chicago, 99 U. S. 635;) and in some of the States the provision has been recently amended by adding to "taken," the words "or damaged." The full scope of this amendment remains to be developed. The courts have shown a disinclination to go beyond the line of speculation as to its limits. But it has been held that that the provision operates

ex proprio vigore, and needs no legislation to render it effective. Johnson v. Parkersburg, 16 W. Va. 402: McElroy v. Kansas City, 21 Fed. Rep. 257; Householder v. Kansas City, Sup. Ct. Mo. 20 Cent. L. J. 156; see also remarks, 20 Cent. L. J. 302. If the right to compensation is given and no remedy is provided, the party may proceed by common law remedy. Johnson v. Parkersburg, 16 W. Va. 402. But where the right to take or injure is sought to be enforced under statutory authority, and the constitution requires the compensation to be fixed by commissioners, the requirement cannot be dispensed with by the legislature, and an ordinary civil proceeding under the code will not lie. Tripp v. Overrocker, 7 Colo. 72. Where the constitution prohibits the taking or damaging of private property *until* compensation is first paid, payment is a condition precedent alike in both instances. McElroy v. Kansas City, 21 Fed. Rep. 257; see also Spencer v. R. R., 23 W. Va. 407; Chambers v. R. R., 69 Ga. 320; Blanchard v. Kansas City, 14 Fed. Rep. 444; but when not first paid, damages may be recovered in common law action, Blanchard v. Kansas City, *supra*. Where there is no provision requiring damages to be paid precedently, he can only recover after they have been suffered and must be recovered by him in one action, Spencer v. R. R., 23 W. Va. 407; Denver v. Bayer, 7 Colo. 113. The mode prescribed for assessing a right of way does not apply where the property has been damaged but not taken, R. R. v. Reinhackle, 15 Neb. 279; Equity will enterfere by injunction in proper cases and require security to be given; and may award an issue *quantum damnificatus*, and direct the damages to be ascertained by freeholders if the constitution requires. But in such cases the chancellor will regard the rights of both parties and consider the solvency of the defendant, the injury to the complainant and the importance of the improvement to the public, McElroy v. Kansas City, *supra*; Mason v. Harper's Ferry Bridge, 17 W. Va. 396; Chambers v. R. R. 69 Ga. 320; Spencer v. R. R., 23 W. Va. 407; Campbell v. R. R. 23 W. Va. 448. The effect of the amendment is to secure not only the corpus of the property from invasion, but also property rights against invasion by damage. Johnson v. Parkersburg, 16 W. Va. 402. The damage need not be direct or physical to the *res*, but wherever there has been a direct physical disturbance of a right either public or private which is enjoyed by the party in connection with his property and which gives to it an additional value, and where, by reason of that disturbance, he has sustained a special damage with respect to his property in excess of that sustained by the public, he will be entitled to compensation. Rigney v. Chicago, 102 Ill. 76, overruling to this extent, Stetson v. R. R., 75 Ill. 74; R. R. v. Hall, 90 Ill.; and Stone v. R. R., 68 Ill. 394; the proposition is sustained in the following cases also: Shawneetown v. Mason, 67 Ill. 477; R. R. v. Francis 70 Ill. 238; City of Pekin v. Brereton, 67 Ill. 477; City of Pekin v. Wenkel, 77 Ill. 56; City of Elgin v. Eaton, 83 Ill. 535; Gottschalk v. R. R., 14 Neb. 554; R. R. v. Reinhackle, 15 Neb. 279; Spencer v. R. R., 23 W. Va. 407; Mason v. Harper's Ferry Bridge, 17 W. Va. 396; Johnson v. Parkersburg, 16 W. Va. 402; City of Atlanta v. Green, 67 Ga. 386; Mullandin v. R. R., 14 Fed. Rep. 394; Householder v. Kansas City, 20 Cent. L. J. 156 (Sup. Ct. Mo.); McElroy v. Kansas City, 21 Fed. Rep. 257; Reardon v. San Francisco, 5 W. C. R. 758; Denver v. Bayer, 7 Col. 113; Hamilton Co. v. Garrett, 62 Tex. Rep. 602. The court, in Denver v. Bayer, qualified the rule by creating an exception in favor of the conveniences of the public; the language is at least misleading; the convenience of the public is not the measure of public right, Stack v. East St. Louis, 85 Ill. 381; the exception would nullify the amendment.

The general rule is that the right to compensation exists in every instance where private property has been damaged, for which a right of action would exist at common law, but for the protection given by the law to those acting under legislative authority. Rigney v. R. R., *supra*, and cases above cited. This is the rule of the English cases upon statutes giving a right of action where private property has been "injuriously affected" by improvements made under Acts of Parliament. East India Docks v. Gattke, 3 McK. & G. 155; Chamberlin v. West End R. R., 2 Best & Smith 605; Eagle v. Charring Cross R. R., L. R. 2 C. P. 638; Becket v. R. R., L. R. 3 C. P. 82; McCarty v. Met. Bd., L. R. 7 C. P. 508. Hence, changing the grade of a street, whether previously established or not, which results in special damage to abutting lots, will give a a right to compensation. Reardon v. City of San Francisco, 5 W. C. R. 758; Johnson v. Parkersburg and Elgin v. Eaton, *supra*. So also where egress and ingress to property is obstructed by locating bridges, viaducts or steam railways upon the street. Every lot owner has an interest distinct from the public at large which will be protected whether the fee to the street is in the public or municipality, or not. R. R. v. Reinhackle, 15 Neb. 280; Denver v. Bayer, 7 Colo. 113; Rigney v. R. R., 102 Ill. So also improvements causing overflows. Atlanta v. Green, 67 Ga. 386; Householder v. Kansas City, Sup. Ct. Mo., Feb. 1885, 20 Cent. L. J. 156. The damage must be more than temporary or speculative: Denver v. Bayer and cases *supra*; but in Denver v. Bayer, the court held that the only damage allowed was the actual diminution of the market value of the premises; this was pure *obiter*, and in cases arising upon statutes having equivalent provisions for compensation it is held that market value is not the only criterion. Eagle v. Charing Cross R. R., L. R. 2 C. P. 638; Chouteau v. St. Louis, 8 Mo. App. 48.

It seems conceded that the amendment will not be operative upon injuries already suffered. The question will arise whether it affects powers *previously granted*. In respect to municipal corporations whose powers are given to be used solely for public benefit as arms of the State, they may be controled or withdrawn at pleasure. Cornell v. People. 107 Ills. 372; 2 Dillon Mun. Corp. 756; it therefore seems clear that the amendment will be operative as to them. McElroy v. Kansas City, 21 Fed Rep. 257. But does the fact that private charters are contracts preclude the operation of the amendment in question upon them? We think the solution is found in the nature of the exemption from liability. The general proposition is that a corporation or person acting in the execution of powers conferred by the legislature will not be liable to third persons for damages resulting from the execution of the power, unless the person or corporation so acting has exceeded the power given or is guilty of negligence or unskillfulness. Sedg. Dam. 111. And the theory of this exemption is that the donee of the power is clothed with the character of *locum tenens* of the State, that the State is not answerable, for in theory of law the State injures no man. Some authorities make a distinction on this subject and hold that a statutory authority will furnish exemption from liability for damage only when the power is exercised as a public trust, solely for public benefit, as by a muncipal corporation; but that the exemption does not extend to powers delegated to private persons or corporations to be exercised mainly for private advantage, because these are not to be regarded as agents of the State possessing a corresponding exemption from liability. Tinsman v. Belvidere etc. R. R., 26 N. J. L. 148 citing English and American cases; approved in McAndrews v. Collard, 42 N. J. L. 191. See also cases cited p. 510, 51 N. H., Eaton v. R.R. There is great force in this distinction, but the weight

of authority does not recognize it. If a private corporation is to be regarded, when acting under the authority of the State, as its agent, it would seem that the immunity from liability for damages which is drawn solely from the right of the principal would be subject to all the vicissitudes to which the principal's right of immunity is subject, and that each agent could not continue to retain an exemption in respect to future acts, beyond that of its principal from whom by reflection the immunity arose. The immunity which one acting under legislative authority enjoys is the sovereigns immunity; it is not an inherent right of the corporation nor does it arise out of contract. See Tinsman v. R. R. *supra*; Transportation Co. v. Chicago, 99 U. S. 635; Sedg. Dam. 111. It may be doubted therefore whether the amendment in question is not operative upon charters previously granted to private corporations, in respect to future acts.

Statutes and municipal charters in some of the States provide for compensation for damages caused by changing the grade of a street. Such provisions are remedial and are to be liberally construed. Mayer v. Nichol. 59 Tenn. 338; a statute allowing damages when property is improved does not limit or require the damage to be to the improvement. Dalzell v. Davenport 12 Iowa 437; Stickford v. St. Louis, 7 Mo. App. 217; damages are not due until injurious act completed. Page v. Boston, 106 Mass. 84; but so far as injury actually done he may recover though incomplete. Schunmaker v. St. Louis, 2 Mo. App. 297; as to what damage is included see Hartshorn v. Worchester, 113 Mass. 111; Bemis v. Springfield, 122 Mass. 110.

GIDEON D. BANTZ.

MUNICIPAL CORPORATIONS CASTING SURFACE WATER UPON PRIVATE LAND.

HETH v. FOND DU LAC.*

MUNICIPAL CORPORATION. [*Surface Water—Injunction.*]—*Not Enjoined from Increasing Flow of Surface Water.*—The resident owner of a lot fronting upon a public street in a city cannot be permitted to restrain such city from constructing drains along the side or culverts across such street, or other streets in the vicinity, or from grading or otherwise improving the same, merely because such acts, when completed, would greatly increase the flow of surface water upon his land.

Appeal from Circuit Court, Fond du Lac county.

This action was brought to restrain the city from opening a culvert across Everett street, on the south line of Second street, and from attempting to carry or drain the waters from the east side of Everett street down along the south line of Second street in front of the property of McDonald. The issues were joined, and the cause tried by the court, which made and filed the following findings: That the allegations of the bill of complaint are true: second, that the proposed ditch or culvert, which the defendant concedes and admits it is about to dig and open, will cast upon the lands of the plaintiffs large quantities of surface water, which were naturally wont to flow in an opposite direction, and which water so cast, by reason of the omission and neglect to provide means for their escape and discharge by the defendant, will greatly incommode and damage the said plaintiffs whenever a flood or heavy rains occur, by standing upon their door-yards, filling their cellars, or injuring flowers, trees and shrubbery, and by filling and flowing upon the streets to the detriment of the public, and by standing until it is removed by process of evaporation, tending to the creation of malaria from noxious vapors, and injuring the public health; that this ditch so proposed to be opened, without any means provided for the escape of water thus proposed to be brought down in front of and upon the lots and door-yards of the plaintiffs, will constitute and create at every freshet a public nuisance, from which special damage will inure to the plaintiffs, so often as there shall be heavy rains and freshets; and as a conclusion of law, applicable to the facts as found, that the plaintiffs are entitled to the relief prayed, and to a judgment for taxable costs and expenses. Ordered accordingly. From the judgment entered thereon the defendants bring this appeal.

E. S. Bragg, for respondent; *P. H. Martin*, for appellant.

CASSODAY, J., delivered the opinion of the court:

Everett street runs north and south. The first street west of it, and parallel with it, is Harney street. Crossing these streets at right angles, or nearly so, are First, Second, Third and Fourth streets, numbered consecutively from the north towards the south. The plaintiffs, respectively, own lots and reside upon the south side of Second street and between Everett and Harney, McDonald's lot being the corner lot next to Harney. It appears from the evidence that, from points at a considerable distance south and southeast of the premises in question, the surface of the ground very gradually descends towards the premises of the plaintiffs, and thence northerly to the lake. From a point on the north side of Second street about 200 feet east of Everett street, there is a ravine or depression in the surface of the ground leading northward to the lake, where most of the surface water east of Everett street was accustomed to flow. From a point in Fourth street about 200 feet east of Harney, there was a ravine or depression in the surface of the ground leading northward over the northeast corner of McDonald's lot, across Second street through a culvert, and thence to the lake. Along this depression most of the surface water from the west and southwest of Everett street was accustomed to flow. That depression was nearly two feet deeper or lower than the one east of Everett street. The west side of Everett street was about one foot higher than the east side. The result was that the grading of Everett street, the opening of a culvert across it at the point designated, and the construction of a ditch or drain from Everett along the south side of

* S. C. 23 N. W. Repr. 495.

Second street to McDonald's lot, would increase the flow of surface water in that direction and upon the lands of the plaintiffs. The threatening of these things, and the alleged insufficiency of the culvert in front of McDonald's, and the alleged consequences which would follow, constitute the substance of the complaint in this action.

The law as to surface water is too well settled in this State to admit of further juridical discussion. The resident owner of a lot fronting upon a public street in a city, cannot be permitted to restrain such municipality from constructing drains along the side or culverts across such streets, or other streets in the vicinity, or from grading or otherwise improving the same, merely because such acts when completed, would greatly increase the flow of surface water upon his land. Waters v. Village of Bay View, 61 Wis. 642; s. c., 21 N. W. Rep. 811; Allen v. City of Chippewa Falls, 52 Wis. 430; s. c., 9 N. W. Rep. 284; Hoyt v. Hudson, 27 Wis. 656; Turner v. Dartmouth, 13 Allen, 291; Barry v. Lowell, 8 Allen, 127; Dickinson v. Worcester, 7 Allen, 19; Flagg v. Worcester, 13 Gray, 601; Parks v. Newburyport, 10 Gray, 28. The same is true with respect to an adjoining land-owner changing the surface of his land, or placing obstructions or embankments thereon, to change the course of surface water thereon. Lessard v. Stram, 22 N. W. Rep. 284; Hanlin v. Railway Co., 61 Wis. 515; s. c., 21 N. W. Rep. 623; O'Connor v. Fond du Lac, etc. R. Co., 52 Wis. 526; s. c., 9 N. W. Rep. 287; Eulrich v. Richter, 37 Wis. 226; Fryer v. Warne, 29 Wis. 511; Gannon v. Hargadon, 10 Allen, 106. This is plainly the rule of the common law, as distinguished from the civil law. Ramsdale v. Foote, 55 Wis. 560; s. c., 13 N. W. Rep. 557. It makes no difference in the application of this rule that land is naturally wet and swampy. 7 Allen, 22. In Waters v. Village of Bay View, *supra*, one of the principal grounds of the complaint was that the village had "permitted a culvert to become filled up, causing water to dam up and flow back upon" the plaintiffs' lands, but it was held that there was no liability. See, also, Barry v. Lowell, *supra*.

The only case in this court which tends in the least to support the contention of the plaintiffs is Pettigrew v. Evansville, 25 Wis. 223; and that case, under the findings of the trial court, is certainly exceptional. In that case the trial judge found that all the material allegations of the complaint were true, and the complaint alleged that there was a large pond or body of standing water in the village; that the defendant had commenced the excavation of a large ditch from such waters towards the plaintiff's premises and near thereto, "for the purpose of draining said standing water in and upon said premises; that it was not necessary to so drain said water, either to improve the streets of the village, or for any other purpose connected with the duties of said corporation." Viewed in the light of such findings, the case cannot be regarded as an authority in support of this judgment. Here there was no pond of water, nor anything to indicate that there was a necessity for doing what the defendant threatened to do. The only complaint is against the diversion of surface water, and the consequences thereof. It is surface water, which, it is found, would, "whenever a flood or heavy rain occurred," stand upon dooryards, fill cellars, injure flowers, trees and shrubbery, and fill and flow upon streets. True, it is found that such things would tend to create malaria and injure the public health, and would constitute and create, at every freshet, a public nuisance, from which special damage would inure to the plaintiffs. But the evidence does not warrant such findings. Besides, the action is not brought on the theory of the abatement of a nuisance, and the complaint does not "contain sufficient allegations to warrant equitable interference. Section 3180 Rev. St., as amended by chapter 190, Laws 1882; Denner v. Railway Co., 57 Wis. 221; s. c., 15 N. W. Rep. 158; Stadler v. Grieben, 61 Wis. 505; s. c., 21 N. W. Rep. 629. In no event was the city obliged to provide against extraordinary rains and floods. Allen v. City of Chippewa Falls, *supra*. Besides, there is no allegation nor proof of any negligence or unskillfulness in doing the work; as in Spelman v. Portage, 41 Wis. 144; Smith v. Alexandria, 36 Amer. Rep. 788. Nor is there any allegation or proof of any defective plan, or want of skill in the planning of the proposed improvement; as in Evansville v. Decker, 84 Ind. 325; s. c., 43 Amer. Rep. 86; Gould v. City of Topeka, 32 Kan. 485; s. c., 4 Pac. Rep. 822; s. c., 30 Alb. Law J. 351; German Theological School v. City of Dubuque, 17 N. W. Rep. 153; Prideaux v. Mineral Point, 43 Wis. 513. Some courts have held that a defective plan is not a ground of action. Urquhart v. Ogdensburg, 91 N. Y. 67, and cases there cited; and cases cited in 32 Kan. 485, and 4 Pac. Rep. 822.

There is no complaint of any malicious act on the part of any of the officers of the city, by which the plaintiffs were injured. The officers of a municipality improving its streets, solely for the public benefit, in an honest, skillful and careful manner, may, at least to a certain extent, exercise their own judgment and discretion as to the location and construction of drains and culverts, the grading and improving of streets, and the direction in which surface water shall be compelled to flow. This is certainly sufficient to dispose of this case, and is within all the authorities cited; and to these others may be added. Smith v. Gould, 61 Wis. 21; s. c., 20 N. W. Rep. 369; Harrison v. Milwaukee Co., 51 Wis. 662-664; s. c., 8 N. W. Rep. 731; Alexander v. Milwaukee, 16 Wis. 248; Methodist Church v. The Mayor, 48 Amer. Dec. 540.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to dismiss the complaint.

NOTE.—Mr. Washburn, in his work on Easements and Servitudes, has observed that by the rule of the civil law, where adjoining lands are so situated that water falling or collected by melting snows and the like, upon one, naturally descends upon the other, the lower land owner must suffer it to be so discharged; that the upper field has a natural easement to have the water flow off upon the field below. Washb. Easem. & Serv. pp. 353, 355. But, though this rule has been adopted in some of the States, it is not the common law rule, and does not generally prevail in the United States. Railroad v. Stevens, 73 Ind. 281. Surface water is a common enemy against which any land proprietor has the right to fight. Stewart v. Clinton, 79 Mo. 612. The general rule is that the owner of property may take such measures as he may deem expedient to keep surface water from his property, or to turn it off of his property without being liable for injuries sustained in consequence by the adjoining owner. Dillon Municip. Corp. § 798; Ang. Water Cours. § 108; 1 Add. Torts 105; Cooley Torts 574; Hilliard Torts, 584; McCormack v. R. R. 57 Mo. 437. "It makes no difference," say the court in the above case (57 Mo. 437), "that the effect of the improvement is to change the flow of the surface water accumulating or falling on the surrounding country, so as either to increase or diminish the quantity of such water, which had previously fallen upon the land of adjoining proprietors to their inconvience or injury." The same rule applies to water escaped from banks or natural channels of running streams, by overflow. McCormack v. R. R., 57 Mo. 438; Abbott v. R. R,, 20 Cent. L. J. 38; Hoester v. Hensath, 20 Cent. L. J. Ad. xiv.

But in the exercise of these rights the owner must do so in a reasonably careful and prudent manner. Cases last cited. "The owner of land could not collect all of the water falling from his buildings during heavy rains and by means of pipes or gutters, precipitate the water thus collected directly upon the land of the adjoining proprietor. Nor could he collect the surface water from the surrounding country into a large reservoir or pond upon the line dividing his land and the land of the adjofning preprietor, and then turn it loose in large quanties on the land of the adjoining proprietor causing him damage." McCormack v. R. R., 57 Mo. 438; McCormack v. R. R., 70 Mo. 358; Hough, J., dissented holding that the facts were not within the rule. See also Cooley Torts pp. 574-580. So also it was held in Templeton v. Vashloe, 72 Ind. 134: That the owner of the upper field may not construct drains or excavations so as to form new channels on the lower field, nor can he collect the water of several channels and discharge it on the lower field so as to increase the *wash* on the same. See also Livingston v. McDonald, 21 Iowa 164. "With reasonably near approximation to accuracy it may be laid down as a general rule that upon the boundaries of his own land, not interfering with any natural or prescriptive water course, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain or snow on his land or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without *artificial interference*, unless within the limits of his own lands he can turn them into a natural water course." R. R. v. Stevens, 73 Ind. 283. The rule applied to muncipal corporations is thus stated by Mr. Cooley: "While they are not bound to construct sewers or drains to protect adjoining owners against the flow of surface water from the public ways, yet if they actually construct such as must carry water upon the adjacent lands, they are liable as much as they would be if they had invaded such lands by sending in their servants or otherwise." Cooley Torts 580. See Pumpelly v. Green Bay Company, 13 Wall 166. Though a municipal corporation is not liable for damage caused by a failure to exercise its discretionary powers, or for the injudicious exercise of its discretion (Stewart v. City of Clinton, 79 Mo. 612; Detroit v. Beckman, 34 Mich. 125; Ashley v. Port Huron, 35 Mich. 296); yet a municipal corporation has no greater right than an individual to collect surface water from its lands and streets into an artificial channel, and then discharge them upon the lands of another. Noonan v. Albany, 79 N. Y. 470; Baynes v. Cohoes, 67 N. Y. 204; Ashley v. Port Huron, 35 Mich. 296. "A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other," per Cooley, J., in Ashley v. Port Huron, *supra;* Pumpelly v. Green Bay Co., 13 Wall. 166; Arimond v. Green Bay, 31 Wis. 316; Eaton v. B. C. & M. R., 51 N. H. 504; Meyers v. City of St. Louis, 8 Mo. App. 267; Smith v. Alexandria, 33 Gratt. 208; Hooker v. New Haven Co., 14 Conn. 146; Glover v. Powell, 2 Stockt. 211; Haynes v. Thomas, 7 Ind. 38; Pratzman v. Indianapolis R. R., 9 Ind. 469; Crawford v. Deleware, 7 Ohio (N. S.), 459; R. R. v. Cummingsville, 14 Id. 523. See, in this connection, Nevens v. Peoria, 41 Ills. 502; Railroad v. Morrison, 71 Ills. 616; s. c., 21 Cent. L. J. 64.

In Shane v. R. R., 71 Mo. 237, Napton, J., applied the theory of the civil law upon which he based his judgment in McCormack v. R. R., 70 Mo. 358, and held that an adjoining owner had no right to erect an embankment so as to stop the flow of surface water, or divert its course so to cause it to flow upon the adjoining land. But this rule was afterwards overthrown by the decision in Abbott v. R. R., 20 Cent. L. J. 38, Sup. Ct. Mo. 1884. See, also, Gannon v. Hargadon, 10 Allen, 106; Hoyt v. City of Hudson, 27 Wis. 656; Petigrew v. Evansville, 25 Wis. 223; Bowlsby v. Speer, 31 N. J. Law, 351; Dickinson v. Worchester, 7 Allen, 19; Chatfield v. Wilson, 28 Vt. 49; Sweet v. Cutts, 50 N. H. 439; Trustees v. Youman, 50 Barb. 316; Waffle v. Ry., 58 Barb. 413; R. R. v. Stevens, 73 Ind. 283; Templeton v. Voshoe, 73 Ind. 134; Stewart v. City of Clinton, 79 Mo. 604.

Whilst the rule of the civil law is said to prevail in Pennsylvania, New Jersey, Illinois, Louisiana, North Carolina and Iowa, see Kauffman v. Griesner, 26 Pa. St. 411; Earl v. Dehart, 12 N. J. Eq. 280; Butler v. Peck, 16 Ohio St. 334; Minor v. Wright, 16 La. Ann. 151; Overton v. Sawyer, 1 Jones Eq. 308; Livingston v. McDonald, 21 Iowa, 164; Martin v. Jett, 12 La. R. 501; Gillham v. Madison Co. R., 49 Ills. 487; Germley v. Sandford, 52 Ills. 160.

GIDEON D. BANTZ.

WEEKLY DIGEST OF RECENT CASES.

1. OFFICER. [*De Facto.*]—*Not Entitled to Salary.* A *de facto* public officer cannot, in California, recover the compensation or salary annexed to the office; for that is incident to the title to the office, and not to its mere exercise. [Dorsey v. Smith, 28 Cal. 21; Stratton v. Oulton, Id. 47; People v. Potter, 63 Id. 127.] *Burke v. Edgar*, S. C. Cal., June 29, 1885; 6 W. C. Repr. 877.

2. POLYGAMY. [*Indictment.*]—*Not Necessary to Aver that Defendant was a Male Person.*—In an indictment under act of congress of March 22, 1882, it is not necessary to aver that the defendant was a male person. *United States v. Cannon*, S. C. Utah, June 27, 1885; 7 Pac. Repr. 369.

3. ——. [*Evidence.*]—*Proof of Sexual Intercourse not Necessary.*—The misdemeanor against which the act of March 22, 1882, is directed, is the dwelling by a man with more than one woman, in the repute of matrimony; and to establish the fact, evidence of sexual intercourse is not necessary. *Ibid*; *S. P. United States v. Musser*, Id. 389.

4. TELEGRAPH COMPANY. [*Negligence.*]—*Direction of Sender to Deliver Message at a Particular Place Should be in Writing.*—The proper mode of directing a telegraph company to deliver at a particular place all telegrams directed to a party, is to leave with the company or send to it at its office directions in writing; and a mere verbal instruction or request to a messenger of the company at some other place than its office, cannot be relied on to fix any legal obligation on the company for a failure to so deliver a message. *Given v. Western Union Tel. Co.*, U. S. Cir., S. D. Iowa, June 11, 1885, opinion by Mr. Justice Miller; 24 Fed. Rep. 118.

5. ——. ——. *Delivery to the Wife of the Addressed in Case of his Absence from the City.*—Where a telegraph company telephones to the place of business of a party to whom a telegram is directed, and, learning that he is out of the city and will be absent for several days, causes said telegram to be delivered at the residence of the party, to his wife, and then informs the sender of the message of the absence of the party from the city, it has performed its duty. *Ibid.*

6. ——. ——. *Keeping Employees Informed of Time of Closing other Offices.*—It is not the duty of a telegraph company, with offices scattered all over the United States, to keep the employees of every one of its offices in the country, or in any one State, informed of the time when every other office closes for the night. [On this point Mr. Justice Miller said: "It is said that the object might have been accomplished if those in charge of the office at Des Moines had known that the office at Marshalltown closed its business at nine o'clock, and had communicated that fact to Josiah Given. It was shown that they did not know this, and that they were not furnished with means of knowing when the offices of the company closed for the night at other places than Des Moines. The want of this information is assigned for negligence. But we do not see any sufficient reason for believing that if Mr. Josiah Given had been told, when he offered his last message, that the office at Marshalltown was closed for the night, that he could have provided any other means of repairing the evil, and so the information, if communicated to him, would have done no good. Nor do we see that it is the duty of the Western Union Telegraph Company to keep the employees of every one of its offices in the United States informed of the time when every other office closes for the night. The immense number of these offices all over the United States, the frequent changes among them as to time of closing, and the prodigious volume of a written book on this subject, seem to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable for damages. There is no more obligation to do this in regard to offices in the same State than those four thousand miles away, for the communication is between them all, and of equal importance."] *Ibid.*

7. ——. ——. *Liability not that of Common Carrier.*—A telegraph company is not an insurer of the delivery of messages; its liability is not like that of a common carrier. [In the opinion of the court it is said by Holt, J.: "A few cases are to be found in which it has been held, that telegraph companies are to be regarded as common carriers; but the later current of authority is not in this direction; and properly so, because the transmission of messages is necessarily subject to the risk of mistake and interruption. The wire is exposed to the interference of strangees; a surcharge of electricity in the atmosphere or a failure of or irregularity in the electrical current may stop communication; and it is continually subject to danger from accident, malice and climatic influence when the company has not the actual, immediate custody of the message as the common carrier has of the merchandise it carries; and it should not, therefore, like a common carrier, be treated not only as a bailee, but as an insurer. Western Union Telegraph Co. v. Blanchard, 45 Am. Reps., p. 480 and cases there cited. It is, however, a public agent; it exercises a *quasi* public employment; carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should abdicate as to the public by a contract with the individual. He is but one of millions; his business will perhaps not admit of delay or contest in the courts, and he is *ex necessitate* compelled to submit to any terms which the company might see fit to impose; but the law should not uphold a contract under which a public agent seeks to shelter itself from the consequences of its own wrong and neglect. Its liability for neglect is not founded purely upon contract. It is chartered for public purposes; extraordinary powers are therefore conferred upon it; it has the power of eminent domain; if it did not serve the public it could not constitutionally lay a wire over a man's land without his consent; and by reason of the gift of these privileges it is required to receive and transmit messages, and is liable for neglect independent of any express contract. The public are compelled to rely absolutely upon the care and diligence of the company in the transaction of this business, so wonderful in its growth, so necessary

to the life of commerce and useful beyond estimate: and if it relies upon a notice or contract to restrict its liability, it must be one not in violation of public policy; and in view of the vast interests committed to a telegraph company, the extraordinary powers given it, and the virtual monopoly it almost necessarily enjoys, the courts should compel it *nolens volens* to perform the corresponding duties of diligence and good faith to the public thereby created. Any other rule would defeat the very purposes for which these companies are chartered, to-wit: the safe and speedy transmission of messages for the public; and while they may reasonably restrict their liability, yet they cannot do so as against their own negligence. They undertake to exercise a public employment, which in many respects is analagous to that of a common carrier; and they must therefore bring to it that degree of skill and care which a prudent man would under the circumstances exercise in his own affairs; and any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non-use is forbidden by the demands of a sound public policy. To hold otherwise would arm them with a very dangerous power, and leave the public comparatively remediless. W. U. T. Co. v. Fontaine, 58 Ga. 433; Wolf v. Western, etc., 62 Pa. 83; Sweetland v. Illinois, etc., 27 Iowa, 432; Breese v. U. S., etc., 48 N. Y. 132; U. S. T. Co. v. Gildersleeve, 29 Md. 232; West. Union v. Buchanan, 35 Ind. 429; Hibbard v. Western Union, 33 Wis. 558; Telegraph Co. v. Griswold, 37 Ohio, 301; Tyler v. West. Union, etc., 60 Ill. 421; Ellis v. American T. Co., 13 Allen, 234. In this instance the failure did not arise in the transmission of the message, or from any cause not within the appellee's control; but from neglecting to deliver it."] *Smith v. Western Union Tel. Co.*, Ky. Ct. of App., May 28, 1885; 7 Ky. Law Repr. 22, 27.

8. ———. ———. [*Proximate and Remote Cause.*] —*Damage to Dealer in Stock, though Non-delivery of Message, when deemed Remote.*—A telegraph company neglected to deliver a message sent to the plaintiff by his broker informing him of the purchase of stock on his account. The market declining heavily, and the broker hearing nothing from the plaintiff, sold out the stock at a great loss. The plaintiff claiming that if the message had been delivered he should have remitted a margin sufficient to prevent the stock being sacrificed or have directed a sale at the first point of decline, sued the company for his loss on the sale. It was held that he could not recover; the damages being too remote. [In the opinion of the court by Holt, J., it is said: "The line between proximate and remote damages is exceedingly shadowy; so much so that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury as to place them in contemplation of law in the relation or cause and effect. The law does not undertake to charge a person with all the possible consequences of a wrongful act; but only with its probable and natural result; otherwise the punishment would often be entirely disproportioned to the wrong, thereby impeding commerce, and the ordinary business of life, and rendering the rule impracticable. Although the damages may arise remotely out of the cause of action, or be to some extent connected with it, yet if they do not flow naturally from it, or could not in the ordinary course of events have been expected to arise from it, they are not in a legal sense sufficiently proximate to authorize a recovery; and the rule, which is common to both the common and civil law, *causa proxima non remota spectatur*, applies. They need not be the immediate result of it—intervening events or agencies may contribute the injury—but they must be certain in their nature and cause, and, as Mr. Greenleaf says, be the natural and proximate consequence of the act complained of. 2 Greenleaf on Evi., p. 210. It is not sufficient that they may be merely a possible result traceable to the cause the complaining party may assign; but they must be such as according to the usual and natural course of things can be considered as fairly and substantially arising from it; otherwise they are not its natural incidents, and can not be considered to have been within the contemplation of the parties when the contract was made. It is not required that they must then have considered them; but they must be such as the parties may fairly be supposed to have considered, or at least would have considered as flowing from a breach of the contract if they had then been informed of all the facts. It was said in Leonard v. Tel. Co., 41 N. Y., 544, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts. This is substantially the rule laid down in the leading case upon this question of Hadley v. Baxendale, 9 Exch., 341, and which has been generally followed both in England and this country. Applying this rule to the case in hand it does not seem to us that the appellant has brought his case within it. It is true that the dispatch showed upon its face that it related to a business transaction; and the jury found as a fact that the appellee's agents understood it; but the injury did not arise naturally from its non-delivery, and from the wording of it, it is impossible to suppose that the parties when it was received for transmission could have contemplated the injury now complained of, if they had then looked to its non-delivery. It merely apprised the appellant that his agent had purchased for him a certain amount of stock. The appellee did not know from it or in any way the purpose to be accomplished or that the appellant already owned other stock, or that a knowledge of its contents was necessary to his conduct in keeping a sufficient "margin" with his broker to prevent a loss, or to guide him as to a sale of his stock. There was an intervening step. If the dispatch had been received, then he might or might not have taken it and acted. It rested altogether with him; and is unlike the case of an agent who is ordered by a telegram to do a certain act, but which, by reason of its non-delivery, he does not do, thereby entailing a loss upon his principal. It does not naturally follow that the appellant would have been any better off now if he had have received it. As well might A claim the stakes in a race from a railroad company that by a delay of its train has prevented his horse from arriving at the race in time to take part in it, although if there, he might have been beaten; or a prize offered for the best model of a machine to be exhibited at a certain day, because by a delay in carrying it his model did not arrive in time to be exhibited. The consequence which resulted to the appellant was not the ordinary result of the failure to deliver the message in question, and hence can not be supposed to have been in contemplation when the company undertook to transmit it. If the minds of the contract-

ing parties had at the time been drawn to the contingency of a failure of performance they could not possibly from the nature of the dispatch have contemplated the loss of which the appellant now complains; and in such a case the company is only liable for nominal damages for its default. Behm v. West. Union, 8 Biss. 131; Lowery v. Same, 60 N. Y. 198; Tel. Co. v. Gildersleve, 29 Md. 232; Graham v. Tel. Co.. 10 Am. Law Reg. 319; Bank v. Same, 30 Ohio 555; Landsberger v. Same, 32 Barb. 530. It is urged, however, that the jury by the answer to the ninth interrogatory found that if the appellant had received the telegram that he would have ordered his stock sold; and that as this finding was not objected to, it is therefore conclusively shown that the loss would not have occurred if the message had been delivered. In our opinion what the appellant might or would have done could not be the subject of a special finding. It was not a matter of fact, and the appellee was not therefore bound to object to it; and it does not follow therefore that it is conclusively shown that the loss was the direct result of the appellee's failure to deliver the message."] *Smith v. Western Union Tel. Co.*, Ky. Ct. of App., May 28, 1885; 7 Ky. Law Repr. 22.

9. USURY. [*Renewals.*]—*Substitution of New Bills for Old does not Efface Taint of Usury.*—Certain due bills bearing usurious interest were surrendered for new bills also at usurious interest and bearing the signatures of new parties in addition to that of the original maker. The maker claiming that the debt was extinguished by payments of usurious interest, and no evidence being offered to the contrary: *Held*, that it was not error for the Orphan's Court to find that the debt was so discharged. The substitution for due bills of others with new signatures added to that of the original maker does not constitute a new contract so as to efface from the transaction the taint of usury.—*Riegel's Appeal*, S. C. Pa., April 9, 1885; 16 Weekly Notes of Cases, 221.

10. WORDS AND PHRASES. [*Summer.*]—*Means the Warmest Season.*—Where, in a stipulation of facts, it was agreed that the debt "accrued in the summer of 1877," a homestead law having taken effect on the first day of June of that year, it was held, that, as the word "summer" is frequently used to indicate the warmest season of the year, it will not be presumed that the debt accrued after the first day of June, say the court: ["The word summer strictly, perhaps, includes only the month of June, July and August, yet it is frequently used in a more general sense to indicate the warmest period of the year. Webst. Dict. 1325."] *DeWitt v. Wheeler*, S. C. Nebr., May 12, 1885; 23 N. W. Repr. 506.

11. WATER. [*Riparian Owners.*] — *Unreasonableness of, to the Injury of Another Riparian Owner, Actionable.*—Where there are several proprietors in the same stream, each has a right to a fair and reasonable participation in the use of the waters; and when this right is violated by an unreasonable use, detention, or diversion of the water by one of them, an action will lie against him by the party injured. So held where a superior proprietor erected a dam and held back the water in unreasonable quantities, to the injury of a mill-owner below. [The case was thus stated by Sherwood, J.: "It appears from the record in this case, that, during the year 1882, the plaintiff was in possession of, and used, and had for many years previous thereto, two mills in the township of Shermain, in Isabella county. These mills were run by water-power upon Chippewa river. One was a grist-mill and the other a saw-mill, and stood side by side, and were joined together, and located about nine miles below the junction of the north and south branches of the Chippewa, which constitute the main stream. The defendants at the same time possessed and controlled a dam known as the "Hudson Dam," and banking ground for logs below the dam, where they were deposited in large quantities by defendants; and this dam was used by them for the purpose of flooding the logs away from the banking ground, and running them into the dam below. The dam was 16 miles, by the current of the stream, above the mills of the plaintiff, and located on the south branch. The plaintiff brought this suit against defendants for unlawfully holding back and diverting the waters of the river in the south branch, thereby preventing him from using his mills. The plaintiff in his declaration particularly sets out the wrong complained of, and alleges that he was thereby deprived of the use of his mills and the profits thereof which he would have made if the waters of the Chippewa had not been diverted." In giving the opinion of the court, the learned justice said: "For the purposes of this suit we must regard the testimony offered sufficient *prima facie* evidence that each party was the owner of the premises he occupied and used upon the stream. The record shows these parties proprietors on the same stream, and as such each has a right to a fair and reasonable participation in the use of its waters. This right the law will always protect, and, when violated, will furnish the proper means of redress. This right is common to all proprietors, and an injury to one which is incident to the reasonable enjoyment of the common right by another, is not actionable. It is only the unreasonable use, detention, or diversion of the water that is actionable. Durmont v. Kellogg, 29 Mich. 420; Hoxsie v. Hoxsie, 38 Mich. 80; Buchanan v. Grand River Log Co., 48 Mich. 367; s. c. 12 N. W. Rep. 490; Pettibone v. Maclem, 45 Mich. 381; s. c. 8 N. W. Rep. 84; Pitts v. Lancaster Mills, 13 Metc. 156; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336. Upon the first question above stated the circuit judge held and charged the jury: 'The plaintiff had the right to have the water of the south branch of the Chippewa river flow into and through his pond in its usual and ordinary mode of flowing, and any detention of the water by defendants, for the sole purpose of securing a flood, in such a manner that it could not be used by plaintiff in the running of his mills, was unreasonable and unlawful as to plaintiff, and entitles him to compensation for the resulting damages. If you find from the evidence that by reason of defendants' holding back the water by means of the dam, that plaintiff was thereby prevented from obtaining a sufficient supply with which to operate his mills, he is entitled to recover such damages as he has suffered by reason of being deprived of the use of his mills.' We think these charges are not subject to the exceptions taken, but that the rule laid down is within the former decisions made by this court, and particularly the last case above cited, which is very much like the present in its facts. We find no occasion for modifying the views therein presented in any respect."] *Woodin v. Wentworth*, S. C. Mich., June 10, 1885; 23 N. W. Repr. 813.

12. WRIT OF ERROR. [*Dismissal.*] — *Right of*

Plaintiff in Error to Dismiss Writ of Error, Notwithstanding Objection of Creditor.—If a judgment be rendered against a party, no creditor of the party, whether he has a lien on his land or not, has a right to obtain a writ of error in the name of the defendant; and if a writ of error is obtained in the name of such defendant, he may at any time dismiss such writ of error with assent of the defendant in error, and no such creditor of the plaintiff in error has a right to object. No court on the application of such a creditor and on his showing, that he would be benefitted by the reversal of such judgment, can properly enjoin the plaintiff in error from dismissing such writ of error. The fact, that the plaintiff in error is a corporation and is insolvent, and that on its application the court had directed the costs of such writ of error to be paid by its receiver out of funds in his hands arising from the renting of the land of such corporation, will not prevent the appellate court, before whom such writ of error is pending, from disregarding such injunction and dismissing the writ of error, if the plaintiff in error and the defendant in error have agreed, that it should be dismissed, and the court is asked to do so.—*Colman v. W. Va. Oil etc. Co.*, W. Va. 148 (Adv. Sheets.)

RECENT PUBLICATIONS.

BLATCHFORD'S REPORTS, VOL. 22. Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit. By *Samuel Blatchford*, Associate Justice of the Supreme Court of the United States. Vol. 22. New York: Baker, Voorhis & Co. 1885.

This volume comprises cases decided during the year 1884. Many of them we know—all of them we presume—were reported in the *Federal Reporter* at the time they were decided, and such of them as seemed to be of interest to our readers were abstracted in our columns. In view of what the *Federal Reporter* is doing for the profession in the way of reporting *all* the decisions of the Circuit and District Courts of the United States as soon as rendered, in a competent and trustworthy manner, and at a price which, for the matter furnished, is little more than nominal, the question arises, is it not time to discontinue these high-priced series of reports, such as Blatchford, Bissell and Sawyer?

KANSAS REPORTS, VOL. 32. A. M. F. Randolph, Reporter. Topeka: T. D. Thacher, State Printer. 1885.

This volume contains cases decided at the January and July terms, 1884. The Judges of the Supreme Court of Kansas are now the Hon. Albert H. Horton, Chief Justice; and the Hons. D M. Valentine and William H. Johnston, Associate Justices. The Hon. Theodore A. Hurd was appointed to fill the vacancy caused by the appointment of the Hon. David J. Brewer to be United States Circuit Judge, and held the office until the election of Judge Johnston. The Kansas court is one of the most learned, painstaking and hard-working courts in the country. Our Missouri court, three years behind its docket, adjourns for four months in the summer, the Kansas court, in an equally warm climate, and its judges drawing smaller salaries, sits every month in the year except August. We understand that each of the Kansas judges is allowed a stenographic secretary at the expense of the State—a thing which greatly increases the amount of work which the court is able to dispose of. The syllabus of each case in the Kansas Reports is drawn by the judge who writes the opinion, and has therefore an official sanction. The same system obtains in Georgia and Ohio, but with this difference, that in Ohio and Kansas, if we understand it rightly, both the opinion and syllabus are official; while in Georgia official sanction attaches to the syllabus alone, the opinion expressing only the views of the particular judge. The opinions of the Kansas court reach the public immediately after their rendition through the *Pacific Reporter*. We have published some of them in full, and have given abstracts of a good many others. It therefore seems unnecessary to make particular mention of the cases reported in this volume.

MISSOURI REPORTS, VOL. 80. Kansas City: Ramsey, Millett & Hudson. 1885.

The cases reported in the first 220 pages of these reports were prepared by Thomas K. Skinker, Esq., the late reporter; the rest were the work of F. M. Brown, Esq., the newly appointed reporter. The work of the new reporter seems to be fairly well done; it will have to be exceptionally well done to sustain the standard of his predecessor. It would be an improvement to give the date when each case was decided. Our present Missouri Reports, like those of Iowa, after which they are modelled, have one excellent feature, the cut-in side-heads, showing the particular place in the opinion at which the discussion of a particular question commences. It is a running index of great utility to one searching the text rapidly. It should never be abandoned. We hope that the reports of the new Appellate Courts of Missouri will have the same feature.

HENRY'S ADMIRALTY JURISDICTION AND PROCEDURE.—The Jurisdiction and Procedure of the Admiralty Courts of the United States in Civil Causes (on the Instance Side). By Morton P. Henry. Philadelphia: Kay & Brother. 1885.

We have examined several portions of this work at different times, and always with the greatest pleasure. It is the work of one who is a finished writer and a thorough scholar in this department of the law. We do not know who the author is; we believe that his name is met here for the first time as a law writer. But whether he is a young lawyer winning his reputation through a book, or an experienced practitioner presenting the results of long research, is immaterial; for he has produced a book which everywhere bears evidence that it is the work of one who has made himself a thorough master, not only of the subject of his treatise, but also of the art of presenting it to the reader in the most acceptable form. It is beautifully printed.

SMITH ON CONTRACTS, SEVENTH AMERICAN EDITION. Philadelphia: T. & J. W. Johnson & Co.

These lectures, by John William Smith, the author of Smith's Leading Cases, remain, perhaps, the most lucid exposition of the principles of the law of contracts in the English language. This edition carries with it the commentaries of four successive editors: Vincent T. Thompson, Esq., editor of the English edition; William Henry Rawle, Esq., and George Sharswood, LL.D., editors of previous American editions; and John Douglass Brown, Jr., editor of this American edition. The essential value of the work is, and must always be, the lucid text of the author. The editors seem to have been conscious of this, and accordingly they have refrained from burying it in mar-

ginal comments and annotations. They seem to have annotated sparingly and judiciously.

HAWKINS ON THE CONSTRUCTION OF WILLS. Second American Edition. Philadelphia: T. & J. W. Johnson & Co.

This is an octavo of less than 400 pages, large, open type. Its author, Francis Vaughan Hawkins, M. A., is a barrister of Lincoln's Inn, and a fellow of Trinity College, Cambridge. The editor of the first American edition was John Sword, Esq., of the Philadelphia bar. He made what we venture to think was an impracticable attempt, considering the small size of the work, to set forth all the American law on the subject, as it exists in decisions and statutes; and to this end he consulted a good many professional gentlemen in different States, to whom he makes acknowledgments in his preface. No one who is acquainted with the number of adjudged cases, and the extent of the statute law in America on the subject, can believe that the field has been at all covered in this little book. This (second) American edition is the work of Frederick M. Leonard, Esq., who modestly says in his preface that "in this edition the notes have been extended to recent cases, and have been increased by the addition of Canadian cases pertinent to the subject." The text of this work is in the form of "rules," comments and illustrations; numerous cases are cited; and, without being able to give a critical opinion of its merits, we should think that one might be expected to find in it the leading principles relating to the interpretation of wills.

CORRESPONDENCE.

PROHIBITION.

To the Editor of the Central Law Journal:

On the question of the discussion of Prohibition in the CENTRAL LAW JOURNAL, perhaps the article on "*Legal Prohibition of the Liquor Traffic*," by Henry Wade Rogers, of Ann Arbor, might be reproduced. It appeared in the *Princeton Review* for January, 1881.

Pulaski, Tenn. FLOURNOY RIVERS.

REMARKS.—We repeat that we cannot go into a discussion of Prohibition. That is a question of social science and politics, and we are publishing a *legal* journal.—[ED. C. L. J.

CONSTITUTIONAL LAW. [RIGHT OF TRIAL BY JURY.]—INJUNCTIONS AGAINST DRAM SHOPS.

To the Editor of the Central Law Journal:

I understand some late decisions have been made by courts in Iowa on the constitutionality of certain provisions of the Prohibitory law of that State. Among other questions, that of granting injunctions on the equity side of that court, and punishing as for contempt any violation of the injunction, thus in substance denying the right of trial by jury for offenses penal in their nature—and also some decisions regarding the right to take such cases from the State to the Federal courts under the Fourteenth Amendment to the Federal Constitution. Can you, without too much trouble, refer me to any such decisions in Iowa? Some interesting questions under our prohibitory law are pending, especially the one raising the point whether the legislature can confer upon our courts the right under the guise of an injunction to try and condemn a man for a misdemeanor, for the trial of which, under the constitution, he has a right to be tried by jury. If you can refer me to any authority on the question I will be obliged.

Leavenworth, Kan. THOMAS P. FENLON.

ANSWER:—The Iowa statute of 1884, Ch. 143, § 12 (amending § 1543 of the Code) declares the business of selling or giving away intoxicating liquors, or the ground, or buildings or utensils employed in such selling or giving away, to be nuisances, and authorizes any citizen of the county in which such a place is kept to maintain a suit in equity for its abatement by injunction. In Littleton v. Fritz, 22 N. W. Repr., 641, the Supreme Court of Iowa holds that this statute is constitutional. We do not know what has been ruled with regard to removing such causes to the Federal Courts.—[ED. C. L. J.

JETSAM AND FLOTSAM.

FRAUD SUFFICIENT TO VITIATE A CONTRACT AND FRAUD SUFFICIENT TO GIVE RIGHT OF ACTION.—Is there any difference between fraud sufficient to vitiate a contract and fraud sufficient to found an action for damages? Your question shows a confusion of ideas on this subject. We cannot in this column devote the space to anything like a clear and concise exposition of the whole subject, but we can clear away a good many difficulties by showing you the main points to be considered, and direct you in what cases and books to read up the subject. Fraud was always recognized both at common law and in equity, but the remedy was not the same. At common law the innocent party to a contract obtained by fraud could always maintain an action for deceit if he could prove his case by showing a material misrepresentation false in fact and false to the knowledge of the party making it, or made by him recklessly, and that the plaintiff was induced thereby to enter into the contract (*i. e.*, were fraudulent), and that the plaintiff acted thereon to his prejudice or injury. Then, and not till then, could the plaintiff recover damages at common law; and to maintain the action now in any division of the High Court the plaintiff must prove the same things as before the Judicature Act. See Smith v. Chadwick, 53 Law J. Rep. Chanc. (H. L.) 873; Arkwright v. Newbold, 50 Law J. Rep. Chanc. 372; L. R., 17 Chanc. Div. 301; Redgrave v. Hurd, 51 Law J. Rep. Chanc. 113; L. R., 20 Chan. Div. 1, and read "Chitty's Contracts" and "Honour's Examination Digest," under the headings of Fraud and Misrepresentation. The courts of Equity assisted the party who had clean hands and had been defrauded by setting aside the contract, if a proper case was shown, provided the plaintiff had not acted on the contract after knowledge of the fraud, and provided the defendant and other third parties, whose interests (if any) are prejudicially affected thereby, can be restored *in statu quo*. See Urquhart v. Macpherson, L. R. 3 App. Cas. 831, and H. A. Smith's "Principles of Equity," and the above-mentioned cases. Then again the fraud can always be waived, and the party defrauded can sue on the contract and claim damages for any breach thereof. The cases where the courts in their exercise of their equitable jurisdiction awarded a decree of specific performance of a contract subject to compensation, or an abatement in the purchase-money, must be distinguished as not coming under the head of fraud.—*Law Journal* (London).

LINCOLN GETTING A CONTINUANCE ON ACCOUNT OF THE DELAY OF MCCLELLAN.—In the convulsions of nations, how rapidly history makes itself. Mr. Lincoln was the attorney of the Illinois Central Railroad Company, to assist the local counsel in the different counties of the circuit; and in De Witt county, in

connection with the Hon. C. H. Moore, attended to the litigation of the company. In 1858 or 1859 he appeared in a case which they did not want to try at that term; and Mr. Lincoln remarked to the court: "We are not ready for trial." Judge Davis said: "Why is not the company ready to go to trial?" Mr. L replied: "We are embarrassed by the absence or rather want of information from Captain McClellan." The judge said: "Who is Captain McClellan and why is he not here?" Mr. Lincoln said: "All I know of him is that he is the engineer of the railroad, and why he is not here this deponent saith not." In consequence of the absence of Captain McClellan the case was continued. Lincoln and McClellan had perhaps never met up to that time, and the most they knew of each other was, that one was the attorney and the other the engineer of the Illinois Central Railroad Company. In less than two years from that time the fame of both had spread as broad as civilization, and each held in his grasp the fate of a nation. The lawyer was directing councils and cabinets, and the engineer in subordination to the lawyer as commander-in-chief was directing armies greater and grander than the combined forces of Wellington and Napoleon at Waterloo.—[*Judge Lawrence Weldon in the New York Tribune.*

LEVYING UPON THE TEETH IN THE DEBTOR'S MOUTH.—Below we give a notice of a sheriff's sale that has no equal in our legal experience. It is clipped from the advertising columns of the Faribault (Minn.) *Democrat*. The peculiarity of this unique levy was the teeth were made by plaintiff upon an order of defendant, and taken from the plaintiff's office during his absence. Payment for the same was refused and executions delivered by the court to seize property to satisfy the judgment rendered in suit to recover, being repeatedly returned unsatisfied, the court, as a great moral example and warning, ordered the sheriff to seize and sell the teeth. *Query*, whether even under these circumstances, the levy could be upheld? Might not the debtor say, in the language of Shakspeare (himself a lawyer):

"——You take my life
When you take that which doth support my life?"
—*Merchant of Venice.*

SHERIFF'S SALE ON EXECUTION.

State of Minnesota, District Court, Rice County, S. T. Clements against A. B. Carothers.

WHEREAS, the judge of said court by an order filed in proceedings supp ementary to execution in the above entitled action, on the 2d day of July, 1885, duly directed and required the above named defendant to deliver to the sheriff of said county, on demand, the upper set of false teeth made by the plaintiff for the defendant, to be applied by said sheriff toward the satisfaction of the judgment rendered in favor of the plaintiff and against the defendant in said action, and the said defendant having delivered the same to the undersigned as such sheriff pursuant to said order;

Now, therefore, notice is hereby given that under and by virtue of a writ of execution issued out of and under the seal of said court, upon a certain judgment duly docketed therein on the 19th day of May, 1885, in favor of the plaintiff and against the defendant, in the sum of $21.10, I have levied upon the upper set of false teeth, aforesaid, as the property of the said defendant, and will sell the same at public auction to the highest bidder for cash, at the south front door of the court house in the city of Faribault in the county and State aforesaid, on the 18th day of July, 1885, at 2 o'clock in the afternoon of that day, to satisfy the amount due thereon.

ARA BARTON,
Sheriff of Rice Co.

A. D. KEYS,
Plaintiff's Attorney.
Dated July 6th, 1885.

WHAT RUINED ELI PERKINS' INTELLECT.—What ruined me and got me into an Idiot Asylum was this: I used to have a strong contempt for lawyers. I thought their long cross-examinations were brainless dialogues for no purpose. But ever since Lawyer Johnson had me as a witness in a wood case I have had a better opinion of the lawyer's skill. In my direct testimony I had sworn truthfully that John Hall had cut ten cords of wood in three days. Then Johnson sharpened his pencil and commenced examining me.

"Now, Mr. Perkins," he began, "how much wood do you say was cut by Mr. Hall?"

"Just ten cords, sir," I answered boldly. "I measured it."

"That's your impression?"

"Yes, sir."

"Well, we don't want impressions, sir. What we want is facts before this jury—f-a-c-t-s, sir, facts!"

"The witness will please state facts hereafter," said the judge, while the crimson came to my face.

"Now, sir," continued Johnson, pointing his finger at me, "will you swear that it was more than nine cords?"

"Yes, sir. It was ten cords—just——"

"There! never mind," interrupted Johnson.

"Now, how much less than twelve cords were there?"

"Two cords, sir."

"How do you know there were just two cords less, sir? Did you measure these two cords, sir?" asked Johnson savagely.

"No, sir, I——"

"There, that will do! You did not measure it. Just as I expected. All guess-work. Now didn't you swear a moment ago that you measured this wood?"

"Yes, sir, but——"

"Stop, sir! The jury will note this discrepancy."

"Now, sir," continued Johnson, slowly, as he pointed his finger almost down my throat, "Now, sir, on your oath, will you swear that there were not ten cords and a half?"

"Yes, sir," I answered meekly.

"Well, now, Mr. Perkins, I demand a straight answer—a truthful answer, sir: How much wood was there?"

"T—T—Ten c-c-cords," I answered, hesitatingly.

"You swear it!"

"I—I—d—d—do."

"Now," continued Johnson, as he smiled satirically, "do you know the penalty of perjury, sir?"

"Yes, sir, I think——"

"On your oath, on your s-o-l-e-m-n oath, with no evasion, are you willing to perjure yourself by solemnly swearing that there were more than nine cords of wood?"

"Yes, sir, I——"

"Aha! Yes, sir. You *are* willing to perjure yourself then? Just as I thought (turning to the judge); you see, your honor, that this witness is prevaricating. He is not willing to swear that there were more than nine cords of wood. It is infamous, gentlemen of the jury, such testimony as this." The jury nodded assent and smiled sarcastically at me.

"Now," said Johnson, "I will ask this perjured witness just one more question."

"I ask you, sir—do you know—do you realize, sir, what an awful—a-w-f-u-l thing it is to tell a lie?"

"Yes, sir," I said, my voice trembling.

"And, knowing this, you swear on your solemn oath that there were about nine cords of wood?"

"No, sir, I don't do any thing of——"

"Hold on, sir! Now, how do you know there were just nine cords?"

"I don't know *any such thing*, sir! I——"

"Aha! you don't know then? Just as I expected. And yet you swore you *did* know. Swore you measured it. Infamous! Gentlemen of the jury, what shall we do with this perjurer?"

"But I——"

"Not a word, sir,—hush! This jury shall not be insulted by a perjurer!"—

"Call the next witness!"

This is why I am now keeping books in a lunatic asylum.—*Eli Perkins.*